Supreme Court, U. S.
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RODAK, JR., CLER

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-167

ALBERTO EFRAIN HERNANDEZ-FERNANDEZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner as named above respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 1, 1979. Petition for Rehearing was timely filed and was denied by the Fifth Circuit on June 28, 1979. A certified copy of the judgment of the Fifth Circuit issued as and for the mandate as to the above named Petitioner was filed on July 16, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix I hereto.

JURISDICTION

This Petition is brought under Rule 19 1.(b), Rules of the Supreme Court of the United States, and 28 U.S.C. 1254 (1),

investing this Court with jurisdiction.

QUESTIONS PRESENTED

1. Whether the trial court erred in denying Defendant's Motions for Mistrial where the conduct complained of was prejudicial to the substantial rights of the Defendant and was of such a nature as to vitiate the final result, thereby requiring a new trial.

2. Whether the trial court erred in permitting the admission of irrelevant and immaterial evidence, having prejudicial impact.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

". . . nor be deprived of life, liberty or property without due process of law . . . "

STATUTES AND FEDERAL RULES INVOLVED

The provisions of Title 21, USC § 841(a)(1), and Title 18, USC, § 924(c)(2).

STATEMENT OF THE CASE

Your Petitioner herein was indicted along with several other individuals in January, 1978, in the United States District Court, Southern District of Florida, Case No. 78-35-Cr-JE, and charged with conspiracy to possess with intent to distribute said controlled substance and unlawful carrying of a firearm during the commission of a felony (Title 21, USC § 841(a)(1); Title 18 USC § 2; Title 18 USC § 924(c)(2)). The alleged offenses came to trial on July 18, 1978, as to your Petitioner only, inasmuch as the co-defendants had entered into plea bargain agreements.

Prior to opening argument, the trial court inquired of the Government as to what "oral statements" made by co-defendants it intended to introduce into evidence. On the basis that "you do not establish a conspiracy itself by somebody else's statements" a standing hearsay objection was made by defense counsel and duly noted by the Court. Said objection was denied.

Motions for mistrial were twice made, the first occurring during the testimony of alleged co-conspirator Arthur Alamo. When asked by the Government if he had occasion to come in contact with the defendant on January 13, 1978, Alamo responded in the affirmative, further indicating that on said date the defendant delivered cocaine to one Karl Zurcher. The second motion was made during cross-examination of Alamo when he was asked if he actually knew the defendant. His response was that "I had seen him and people had pointed him out to me as being a cocaine source." Motions for mistrial were twice denied.

On July 20, 1978, the jury returned a verdict of guilty on Counts I, II and IV. A written motion for new trial was made on behalf of your Petitioner, but summarily denied by the Court. Your petitioner was subsequently sentenced to four years, with a special parole term of three years, as to Count I; four years with a special parole term of three years as to Count II and one year as to Count IV. Although Counts I and II are to run concurrent, the period of confinement specified as to Count IV is to run consecutively.

A Notice of Appeal was thereafter timely filed, and an appeal bond was posted to assure that your petitioner would be forthcoming to abide the sentence of the trial court, or the opinion and mandate of the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

Whether the trial court erred in denying Defendant's Motions for Mistrial where the conduct complained of was prejudicial to the substantial rights of the defendant and was of such a nature as to vitiate the final result, thereby requiring a new trial.

A mistrial is properly demanded and should be granted when error compounded upon error is so prejudicial to a defendant's substantial rights, including his right to a fair and impartial trial, that cautionary instructions to the jury would not be sufficient. Although the question of whether to declare a mistrial is within the discretion of the trial court, such discretion is not without its bounds. A mistrial must be ordered under those circumstances where the testimony in error creates so strong an impression in the minds of the jurors that they are unable to disregard same in their consideration of the case. *Maestas v. United States,* 341 F.2d 493 (10 CA, 1965); *United States v. Beran* , 546 F.2d 1316, cert. den. 430 US 916, 97 S.Ct. 1330, 51 L.Ed.2d 545; *Marshal v. United States*, 360 US 310, 79 S.Ct. 1171, 3 L. Ed.2d 1250.

When Government witness Alamo was questioned as to whether or not he actually knew the defendant, his response was that "I had seen him and people had pointed him out to me as being a cocaine source." This comment by Alamo compelled that the trial Court declare a mistrial. This grievous error could in no way be cured by a jury instruction to "not consider that answer." On direct examination the Government asked Alamo if he had occasion to come into contact with the defendant on January 13, 1978. Alamo responded in the affirmative, further indicating that a cocaine deal was closed on that date. As argued by defense counsel, "That is within the confines of absolutely no testimony . . . of any other witness that brings this within any period of the conspiracy." The defendant's Motion for Mistrial should have been granted.

The trial court erred in permitting the admission of irrelevant and immaterial evidence, having prejudicial impact.

As previously stated, Government witness Alamo informed the trial court and the jury about a cocaine deal which he closed on January 13, 1978. Alamo confirmed the defendant's participation in and detailed the circumstances of the transaction. That alleged criminal transaction was not within the purview of the indictment upon which the defendant was being tried. Evidence of prior crimes or ciminal conduct is not admissable to show the propensity or proclivity of an accused to commit the crime charged. Whatever probative value the prior conduct of a defendant may add to the prosecution's case even on the issue of the defendant's intent to commit the conspiracy here claimed, is far outweighed by the unwarranted inferences the jury is permitted to draw. *United States v. Decicco,* 435 F.2d 478 (2 CA, 1970). This evidence should have been excluded and the trial court erred in not so doing.

CONCLUSION

Based upon the foregoing reasons and citations of authority, your Petitioner, ALBERTO EFRAIN HERNANDEZ–FERNANDEZ, respectfully asks that the Writ of Certiorari issue.

Respectfully submitted,

LAW OFFICES OF
HENRY GONZALEZ

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and upon the United States Attorney for the Southern District of Florida, Suite 300, Ainsley Building, Miami, Florida, this 31st day of July, 1979.

HENRY GONZALEZ

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-5659

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

ALBERTO EFRAIN HERNANDEZ-FERNANDEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(JUNE 1, 1979)

Before BROWN, Chief Judge, CLARK and VANCE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local 21.[1]

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1979. A petition for rehearing was denied on June 28, 1979. The petition for a writ of certiorari was filed on July 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the answer given by a government witness to a question posed by petitioner's counsel was so prejudical as to require a mistrial, where the court immediately instructed the jury to disregard the answer.

2. Whether testimony concerning a drug transaction that took place early in the conspiracy was properly admitted.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was also convicted of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).[1] He was sentenced to terms of imprisonment totalling five years and to a three-year special parole term. The court of appeals affirmed.

The government's evidence showed that on January 16, 1978, DEA undercover Agent Vincent Mazilli contacted Lonnie Levin and discussed with him the purchase of cocaine (Tr. 29-30). This transaction was confirmed the following day when Mazzilli agreed to purchase from Levin five kilograms of cocaine at $39,000 per kilogram (Tr. 31-33, 36).

On January 18, 1978, Mazzilli and another DEA agent attempted to obtain delivery. After permitting Levin and Arthur Alamo to view the purchase money, the agents accompanied the two men to an apartment building where Mazzilli met with a third man, Juan De La Cruz Garcia (Tr. 34-42, 208). When Garcia was satisfied that the

[1]Other individuals charged in the conspiracy were Lonnie Levin, Juan De La Cruz Garcia, Arthur Alamo, Senen Hurtado and Karl Alan Zurcher. Each of these co-defendants pled guilty prior to trial, and Arthur Alamo testified as a government witness at petitioner's trial (Pet. 3).

agents were able to pay for the cocaine, he announced he would call the source to obtain delivery (Tr. 49). Garcia then called a telephone number listed to petitioner's business, but could not reach his source (Tr. 51-52, 145). Later that afternoon, Garcia told Alamo that the cocaine was on the way and that the agents should return to the apartment (Tr. 53).

When the agents returned to the apartment, they gave Garcia the $39,000, and the agents waited for the cocaine to arrive (Tr. 72). The agents began to leave at 6:30 p.m., however, because the source still had not arrived. Alamo stopped them from driving away by announcing that "Alberto" had just called and said he was coming (Tr. 76-77, 148, 222). Petitioner arrived one-half hour later and was greeted as "Alberto" (Tr. 79-80, 225). Senen Hurtado, who arrived with petitioner, then opened a suitcase he had brought and handed an agent a kilogram of cocaine (Tr. 80-81). Petitioner and the other co-conspirators (except Levin who had left the apartment earlier) were then arrested.

ARGUMENT

1. Alamo pleaded guilty and testified for the government at petitioner's trial. Petitioner contends (Pet. 4-5) that one of Alamo's answers to a question posed by defense counsel was so prejudical as to require a new trial.

The question and answer to which petitioner objects were as follows (Tr. 169-170):

A. As a matter of fact, is it not true that you did not know Albert Hernandez, the defendant in this case?

Q. I had seen him and people had pointed him out to me as being a cocaine source.

Petitioner's counsel immediately moved for a mistrial. The trial court denied this motion, but did immediately instruct the jury as follows (Tr. 171-172):

> Now, ladies and gentlemen, the question of this witness, as I recall it, although it was phrased with some—is it not true that you did not or something of that nature, I think the question was did you know this man before a certain date.
>
> The answer that this gentlemen gave was not responsive to that question.
>
> He discussed something with you about what other people had told him which is entirely inadmissible for your consideration.
>
> We do not try cases on the basis of the fact that somebody said somebody else told me so-and-so.
>
> That is known as hearsay and there is no opportunity to cross examine anybody that may, if you believe that, have told this man anything.
>
> That is not evidence for you to consider in this case, you understand what I am saying to you.
>
> There are people that tell folks that Judge So-and-so will take a bribe.
>
> Well, certainly if that man could come in and testify, hey, Frank told me that such-and-such would happen, therefore, it is true, you understand what I am saying to you. Do not consider that answer.

When otherwise improper hearsay has been invited by the defendant's questioning, no reversible error occurs by its admission. See *United States* v. *Doran*, 564 F. 2d 1176, 1177 (5th Cir. 1977), cert. denied, 435 U.S. 928 (1978);

United States v. *Duff*, 551 F. 2d 187, 189 (7th Cir. 1977); *United States* v. *Brooks*, 449 F. 2d 1077, 1082 (D.C. Cir. 1971). In this case, defense counsel could well have anticipated that, in asking Alamo if he actually knew petitioner, it would be natural for Alamo to respond by stating the circumstances in which they became acquainted. But even if this testimony was uninvited, the trial court, through its instructions emphatically admonishing the jury not to consider Alamo's hearsay response, cured any possible prejudice. See *United States* v. *Harris*, 558 F. 2d 366, 369 n.4 (7th Cir. 1977); *United States* v. *Cordova*, 537 F. 2d 1073, 1077 (9th Cir.), cert. denied, 429 U.S. 960 (1976). See also *Frazier* v. *Cupp*, 394 U.S. 731, 735-736 (1969). Under these circumstances, the court did not abuse its broad discretion over matters of this nature (*Arizona* v. *Washington*, 434 U.S. 497, 510-514 (1978)) in declining to abort the trial.[2]

2. Petitioner also argues (Pet. 5) that the district court should not have admitted Alamo's testimony that he and three other men purchased a kilogram of cocaine from petitioner on January 13, 1978 (Tr. 134-137). This contention is without merit.

Rule 404(b), Fed. R. Evid., provides that evidence of other crimes, wrongs, or acts may be admissible to prove a defendant's knowledge, intent, preparation, or plan. Petitioner testified that he had no knowledge of what was inside Hurtado's suitcase and that he had accompanied Hurtado to Garcia's apartment hoping to obtain repayment of a debt (Tr. 338-339, 342-343, 346-347). In light of this defense, the admissibility of the challenged evidence is

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[2]Even without the curative instruction, it is highly unlikely that Alamo's answer would have prejudiced the defense; for petitioner's own admissions to DEA agents confirmed that he was a cocaine source (Tr. 295-298).

apparent. Testimony that petitioner sold cocaine to co-conspirators on January 13, 1978, was probative of petitioner's intent on January 18, 1978. See *United States* v. *Maestas*, 546 F. 2d 1177, 1180-1181 (5th Cir. 1977); *United States* v. *Riggins*, 539 F. 2d 682, 683-684 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977).

In any event, the conspiracy charged in the indictment included Garcia, Levin, and Alamo, as well as petitioner, and covered the dates January 13, 1978 through January 18, 1978. The indictment listed, as an overt act, the purchase by Levin and Alamo of approximately 1,000 grams of cocaine from Garcia on January 13, 1978. Alamo's testimony, therefore, was not extrinsic evidence of a prior offense, but rather evidence tending to establish the existence on January 13, 1978, of the conspiracy with which petitioner was charged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

OCTOBER 1979

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